Public Prosecutor v Dato' Seri Anwar bin Ibrahim

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–19–01 OF 2012
RAMLY ALI, ROHANA YUSUF AND ZAWAWI SALLEH JJCA
11 OCTOBER 2013

Criminal Procedure — Prosecution — Public prosecutor — Whether public prosecutor's appointment of advocate as his deputy to prosecute specific appeal was valid — Section 376(3) of the Criminal Procedure Code ('CPC') — Whether s 378 of the CPC could bar appointment made under s 376(3) — Whether legislative provisions in statute should be read harmoniously with other provisions therein and not in isolation — Whether doctrine of desuetude applied to Malaysian laws

Pending the hearing of the instant appeal against the High Court's decision to acquit and discharge the respondent of a charge under s 377C of the Penal Code, the attorney-general/public prosecutor by letter appointed an advocate and solicitor ('Dato' Sri Shafee') as deputy public prosecutor ('DPP') pursuant to s 376(3) of the Criminal Procedure Code ('CPC') to prosecute the appeal on the appellant's behalf. The respondent applied to nullify the appointment arguing, inter alia, that: (i) s 378 of the CPC, as amended, barred an advocate from appearing on behalf of the PP; and (ii) Dato' Sri Shafee was a potential witness in the trial and therefore would be in a conflict of interest situation in breach of r 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978. The respondent argued that Dato' Sri Shafee's appointment could also not be made under s 379 of the CPC as that provision had become obsolete by the doctrine of desuetude.

Held, dismissing the application:

(1) The public prosecutor ('PP') appointed Dato' Sri Shafee under s 376(3) of the CPC as was clearly stated in his appointment letter. The appointment was specifically for the purpose of the pending appeal. By that appointment, Dato' Sri Shafee was a DPP who could exercise all or any of the rights and powers vested under the law except those powers that were reserved specifically to the PP personally. Section 378 of the CPC did not prohibit a person who was appointed under s 376(3) because by that appointment, Dato' Sri Shafee was to all intents and purposes a DPP (see paras 14–15).

(2) Section 376(3) of the CPC allowed the PP to directly appoint fit and proper persons to be DPP whereas under s 379 the appointment was by the fiat of the PP. Under s 379 an advocate given the fiat by the PP was deemed to be a public servant (see paras 10–11).

(3) The respondent's argument merely focused on the prohibitive provision in s 378 to contend that an advocate could no longer appear on behalf of the PP. Legislative provisions must first be given their plain meaning and each provision of the law could not be interpreted in isolation. Section 378 must be interpreted in the light of the other provisions. By highlighting the prohibition under s 378 alone, without considering other related provisions, might lead to an inaccurate conclusion (see paras 12–13).

(4) The fact that the trial was over and neither the prosecution nor the defence had called for Dato' Sri Shafee's evidence at the trial dispelled any thought of him being a material witness. It was amply clear Dato' Sri Shafee was not a material witness to both the prosecution as well as the defence. The prosecution in the instant appeal was purely to be deliberated on the appeal records before the court. No witnesses would any longer be required (see paras 31 & 34).

(5) The court could not see the relevance of s 379 of the CPC to Dato' Sri Shafee's appointment in the present case. In any event, the doctrine of desuetude did not apply to s 379 of the CPC or to any of the laws of Malaysia. Malaysian legislation was perpetual in duration and continued in force until it was either repealed or it expired. For a legislation to lose its applicability, it must be specifically repealed by Parliament. It could be impliedly repealed simply by passage of time or inactive use (see paras 16, 23 & 25).

[Bahasa Malaysia summary

Sementara menunggu selesai perbicaraan rayuan ini terhadap keputusan Mahkamah Tinggi untuk melepas dan membebaskan reponden daripada pertuduhan di bawah s 377C Kanun Keseksaan, Peguam Negara/pendakwa raya ('PR') melalui surat telah melantik peguambela dan peguamcara ('Dato' Sri Shafee') sebagai timbalan pendakwa raya ('TPR') menurut s 376(3) Kanun Tatacara Jenayah ('KTJ') untuk menjalankan pendakwaan bagi pihak perayu. Responden memohon untuk dibatalkan pelantikan itu dengan berhujah, antara lain, bahawa: (i) s 378 KTJ, sepertimana dipinda, menghalang peguambela daripada hadir bagi pihak PR; dan (ii) Dato' Sri Shafee adalah saksi berpotensi dalam perbicaraan itu dan oleh demikian akan berada dalam keadaan konflik kepentingan yang melanggar k 5(a) Kaedah-Kaedah (Amalan dan Etika) Profesion Undang-Undang 1978. Responden berhujah bahawa pelantikan Dato' Sri Shafee juga tidak boleh dibuat di bawah s 379 KTJ kerana peruntukan itu telah lapuk oleh doktrin sudah tidak dipakai lagi.

Diputuskan, menolak permohonan:

(1) Pendakwa raya ('PR') telah melantik Dato' Sri Shafee di bawah s 376(3) KTJ sebagaimana dinyatakan dengan jelas dalam surat pelantikannya.

Pelantikan itu khusus bagi tujuan rayuan yang belum selesai itu. Dengan pelantikan itu, Dato' Sri Shafee adalah TPR yang boleh manjalankan semua atau mana-mana hak atau kuasa yang diberikan di bawah undang-undang kecuali kuasa-kuasa yang dihadkan khususnya untuk PR itu sahaja. Seksyen 378 KPJ tidak melarang seseorang yang dilantik di bawah s 376(3) kerana melalui pelantikan itu, Dato' Sri Shafee menurut semua niat dan tujuan adalah seorang TPR (lihat perenggan 14–15).

(2) Seksyen 376(3) KTJ membenarkan PR secara langsung melantik orang-orang yang sesuai dan wajar untuk menjadi TPR manakala di bawah s 379 pelantikan itu adalah melalui fiat PR itu. Di bawah s 379 seorang peguambela yang diberikan fiat oleh PR itu dianggap pengkhidmat awam (lihat perenggan 10–11).

(3) Hujah responden hanya tertumpu kepada peruntukan larangan dalam s 378 untuk berhujah bahawa seorang peguambela tidak lagi boleh hadir bagi pihak PR. Peruntukan perundangan pertamanya perlu memberikan maksud harfiahnya dan setiap peruntukan undang-undang tidak boleh ditafsir secara berasingan. Seksyen 378 perlu ditafsirkan bersama peruntukan-peruntukan lain. Dengan memberi penekanan tentang peruntukan larangan di bawah s 378 sahaja, tanpa mengambil kira peruntukan berkaitan yang lain, mungkin membawa kepada kesimpulan yang kurang tepat (lihat perenggan 12–13).

(4) Fakta bahawa perbicaraan telah berakhir dan pihak pendakwaan atau pihak pembelaan tidak memanggil keterangan Dato' Sri Shafee semasa perbicaraan menolak apa-apa pendapat bahawa dia adalah saksi utama. Adalah jelas Dato' Sri Shafee bukan saksi utama untuk kedua-dua pihak pendakwaan dan pembelaan. Pendakwaan dalam rayuan ini telah dipertimbangkan berdasarkan rekod rayuan di hadapan mahkamah. Tiada saksi yang diperlukan (lihat perenggan 31 & 34).

(5) Mahkamah tidak dapat melihat keperluan 379 KTJ berkaitan pelantikan Dato' Sri Shafee dalam kes ini. Dalam apa-apa keadaan, doktrin sudah tidak dipakai lagi adalah tidak terpakai kepada s 379 KTJ atau mana-mana undang-undang Malaysia. Perundangan Malaysia adalah dalam jangka masa berkekalan dan terus berkuat kuasa sehingga ia dimasuhkan atau luput. Untuk suatu perundangan tidak lagi terpakai, ia perlu secara spesifik dimansuhkan oleh Parlimen. Ia boleh secara tersirat dimansuhkan hanya dengan peredaran masa atau tidak digunakan secara aktif (lihat perenggan 16, 23 & 25).]

Notes

For cases on public prosecutor, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3282–3285.

Cases referred to

Bowman v Secular Society Ltd [1917] AC 406, HL (refd)
Brown v Magistrate of Edinburgh (1931) SLT 456 (refd)
Johnson Tan Han Seng v PP; Soon Seng Sia Heng v PP; PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66, FC (refd)
Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors (Uma Devi d/o R Balakrishnan, Third Party) [2003] 6 MLJ 703; [2003] 4 CLJ 587, HC (refd)
PP v Dato Seri Anwar bin Ibrahim & Anor [2001] 3 MLJ 193, HC (refd)
Perbadanan Pembangunan Pulau Pinang v Tropiland Sdn Bhd [2009] MLJU 120; [2010] 2 CLJ 1061, HC (refd)
RS Muthiah v Pembinaan Fiba Sdn Bhd [2004] 4 MLJ 78; [2004] 2 CLJ 917, HC (refd)
Skyes v Director of Public Prosecutions [1962] AC 528, HL (refd)

Legislation referred to

Criminal Procedure Code ss 112, 376(1), (3), 378, 378(3), 379, 418A
Evidence Act 1950 s 114(g)
Federal Constitution arts 66, 145, 145(3)
Legal Profession (Practice and Etiquette) Rules 1978 rr 3(b)(ii), 5(a)
Penal Code s 377C

Appeal from: Criminal Trial No 45–9 of 2009 (High Court, Kuala Lumpur)

Muhammad Shafee bin Md Abdullah (Mohamad Hanafiah bin Zakaria and Noorin bt Badaruddin with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the appellant.
Karpal Singh (Ramkarpal Singh, Sangeet Kaur and Zaleha Al-Hayat with him) (Karpal Singh & Co) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

INTRODUCTION

[1] Before us in encl 27a is an application by the applicant/respondent by way of notice of motion to disqualify Dato' Sri Dr Mohammad Shafee bin Abdullah's ('Dato' Sri Shafee') appointment as deputy public prosecutor to prosecute the appeal in Rayuan Jenayah No W-05–19–01 of 2012 against the applicant's acquittal by the Kuala Lumpur High Court. The application is supported by an affidavit affirmed by the applicant, Dato' Seri Anwar Ibrahim, in encl 27b. There were two affidavits in reply deposed by Dato' Sri Shafee in encl 31 and by Puan Noorin bt Badaruddin in encl 32 respectively filed on behalf of the respondent.

[2] On 18 September 2013, the date fixed for hearing of this application,

Mr Karpal Singh, learned counsel for the applicant sought for a postponement of the hearing because he required time to reply to both the affidavits in reply, which were served on the applicant about four days before the hearing date, that was on 12 September 2013. The application for an adjournment was objected to by the respondent who then decided to withdraw both affidavits in reply. We accordingly struck off both the affidavits. We proceeded to hear this application, which we have dismissed. We now give our reasons for our decision.

BRIEF BACKGROUND

[3] The applicant was charged at the sessions court in Kuala Lumpur for an offence under s 377C of the Penal Code. Upon issuance of the certificate of the public prosecutor under s 418A of the Criminal Procedure Code, the case was transferred and tried at the High Court Kuala Lumpur. After a trial the Applicant was acquitted and discharged and the respondent lodged an appeal at the Court of Appeal against the said acquittal and discharge. The said appeal in Rayuan Jenayah No W-05–19–01 of 2012 is pending at the Court of Appeal.

[4] For the purpose of the appeal, Dato' Sri Shafee was appointed as the deputy public prosecutor by the attorney general/public prosecutor, by a letter dated 2 July 2013 pursuant to s 378(3) of the Criminal Procedure Code ('CPC'). This application seeks to disqualify and prohibit Dato' Sri Shafee, to act as counsel on behalf of the respondent/public prosecutor.

GROUNDS OF APPLICATION

[5] The applicant challenged the appointment on the grounds that:

(a) the appointment of Dato' Sri Shafee under ss 376(3) and 379 of the Criminal Procedure Code and art 145 of the Federal Constitution is not valid, a nullity and is of no effect;

(b) section 378 prohibits an advocate to appear on behalf of the public prosecutor (PP) and the appointment of an advocate as a DPP and his appointment under s 379 is void on account of the doctrine of desuetude; and

(c) Dato' Sri Shafee was a potential witness in the sodomy trial and would place himself in a position of conflict and is thereby in breach of r 5(a) of the Legal Profession Act (Practice and Etiquette) Rules 1978.

APPOINTMENT UNDER CPC

[6] It was contended by learned counsel for the applicant Mr Karpal Singh

that as a result of the amendment to s 378 Dato' Sri Shafee, as an advocate, can no longer appear on behalf of the PP in any criminal appeal. He submitted, unlike the repealed provision of s 378, the current provision prohibits an advocate from appearing. By comparing these two provisions, Mr Karpal Singh argued that the intention of the legislation is made clear, that is to preclude advocate from being appointed to appear on behalf of the public prosecutor in criminal proceedings. In the same token he argued s 379 is no longer applicable and an appointment made under that section is a nullity because s 379 is no longer valid by the doctrine of desuetude.

[7] Learned counsel invited us to compare the current provision of s 378 with the repealed provision, to contend that by virtue of the exclusion of the last phrase that *'… an advocate expressly authorised in writing by the Public Prosecutor, can appear on behalf of the PP…'* in the current provision, an advocate cannot be appointed under s 379 to appear on behalf of PP. We reproduced the two provisions below for ease of reference and comparison. The current provision of s 378 states:

> 378 No one to appear for Public Prosecutor.
>
> No person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor, a Senior Deputy Public Prosecutor or a Deputy Public Prosecutor.

The repealed provision (prior to 1 April 1998) was as follows:

> 378 No one to appear for Public Prosecutor
>
> No person shall appear on behalf of the Public Prosecutor on any chminal appeal other than the Public Prosecutor, or a Deputy Public Prosecutor, or a police officer not below the rank of Inspector, or an advocate expressly authorised on writing by the Public Prosecutor or by a Deputy Public Prosecutor, acting on behalf on the Public Prosecutor.

[8] It was pointed out by learned counsel for the applicant that because the current s 378 no longer contains the last phrase as highlighted above, there is now complete prohibition on an advocate appearing on behalf of the PP.

[9] In our view before we deliberate on the contended prohibition it would first be necessary to examine the powers conferred on the PP in criminal cases generally, to set in motion the relevant provisions on this subject. We will begin with art 145 of the Federal Constitution. The power of the attorney general to institute, conduct or discontinue any proceeding for an offence is prescribed by art 145(3). The attorney general, following s 376(1) of the CPC shall be the public prosecutor and shall have control and direction of all criminal prosecution.

[10] There are two main provisions that deal with appointment by which the PP is empowered to do in relation to criminal proceedings. First, under s 376(3) of the CPC, which allows the PP to appoint fit and proper persons to be deputy public prosecutors. A deputy public prosecutor (DPP) appointed under s 376(3) may exercise all or any of the rights and powers vested under the law unless the law expressly states that such power had to be exercised by the PP personally. The other, is under s 379. Under this provision, by fiat of the PP an advocate may be employed by the government to conduct criminal prosecution or inquiry or to appear on any criminal appeal on point of law reserved to the PP.

[11] Upon our plain reading of these two provisions we find that these are modes of appointment envisaged by the CPC. The appointment under s 376(3) is a direct appointment by the PP whereas, under s 379 an appointment is by the fiat of the PP. Under s 379 an advocate given the fiat by the PP shall be deemed to be a public servant.

[12] With respect, we are not able to appreciate the approach taken by Mr Karpal Singh in his argument that merely focusses on the prohibitive provision in s 378 to contend that an advocate can no longer appear on behalf of the PP.

[13] We take the approach that legislative provisions must first be given their plain meaning and each provisions of the law cannot be interpreted in isolation. Section 378 must be interpretated in the light of the other provisions. By highlighting the prohibition under s 378 alone, without considering other related provisions, it may lead to an inaccurate conclusion.

[14] It would therefore appear that learned counsel's submission quite simply ignores the existence of s 376(3), which authorises the appointment of a fit and proper person to be a DPP. The appointment of Dato' Sri Shafee is clearly made under s 376(3), which we note had escaped the submission of learned counsel both in the oral as well as his written submissions. Section 378 as we understand it, does not prohibit a person who is appointed under s 376(3) because by that appointment, Dato' Sri Shafee is to all intends and purposes a DPP.

[15] There is no doubt that the PP appointed Dato' Sri Shafee under s 376(3), as clearly stated in the appointment letter of 02 July 2013. The appointment is specifically made for the purpose of the pending appeal in Rayuan Jenayah No W-05–19–01 of 2012. By this appointment Dato' Sri Shafee, is a DPP who may exercise all or any of the rights and powers vested under the law except those powers that are reserved specifically to the PP personally. It goes without saying that s 378 does not prohibit Dato' Sri Shafee who is an appointed DPP.

[16] We now come to s 379 which learned counsel submitted to be obsolete by the doctrine of desuetude. Before we proceed to deliberate on the submission of learned counsel on this doctrine, we do not see the relevance of s 379 to the appointment of Dato' Sri Shafee in the present case.

[17] That, notwithstanding learned DPPs, (Dato' Mohamad Hanafiah bin Zakaria and Puan Noorin bt Badaruddin with him) on behalf of the respondent, joined in fray of submitting at great length on the non-applicability of the doctrine to Malaysian laws. Suffice for us to state the legal position of this doctrine in Malaysia.

[18] The doctrine of desuetude holds that *'if a statue or treaty is left unenforced long enough, the court will no longer regard it as having any legal effect even though it has not been repealed'* (*Black Law Dictionary* (9th Ed at p 513). It entails a legal process by which, through disobedience and lack of enforcement over a long period, a statute may in some legal systems lose its force without express or implied repeal or expiry. In Malaysia the law making process is found in art 66 of the Federal Constitution. The legislative body is conferred with the power to legislate laws, which would necessarily include the power to repeal any law. The doctrine of desuetude does not have a place in this country as the legislative power as well as the legislative making process is enshrined in the Federal Constitution, and it is bestowed on the legislative body.

[19] This doctrine has not been applied in any jurisdiction except in Scotland. That too, it was subject to the fact that the law was not in operation for a very considerable period but not by mere neglect as stated in the case of *Brown v Magistrate of Edinburgh* (1931) SLT (Scots Law Times Reports) 456.

[20] Learned counsel for the applicant did not elucidate the reason why this doctrine applies to s 379 particularly as to the length of the period that this provision had been neglected or abandoned or not in operation, to attract this doctrine. Conversely, he acknowledged that s 379 was used in the appointment of Dato' Tan Hock Chuan in the public inquiry of Teoh Beng Hock's case. For the purpose of this argument we note that there are two situations that the PP can give his fiat under s 379. One is to the conduct criminal prosecution and the other is to conduct inquiry. The appointment of Dato' Tan Hock Chuan was for the purpose of public inquiry. This goes to show that s 379 was invoked during the public inquiry of Teoh Beng Hock in July 2009. Far from being abandoned it is clear that as recent as the year 2009, s 379 was in fact in operation.

[21] In support of his argument, Mr Karpal Singh sought to distinguish the appointment for the purpose of public inquiry with the appointment of an advocate to conduct criminal proceedings, albeit under the same provision. He

argued therefore the appointment of Dato' Tan Hock Chuan cannot substantiate a case that s 379 is still in operation for the purpose of appointing an advocate to conduct criminal appeal. We are not able to accept the argument by learned counsel that the same provision of law can be rendered obsolete for one purpose and not the other. We are of the view that it is rather untenable to suggest that some part of the same provision of the law remains; the other is obsolete by desuetude.

[22] The Supreme Court in *Johnson Tan Han Seng v PP* [1977] 2 MLJ 74 rejected this doctrine and took a position that it has no application in this country. The Supreme Court in deliberating on this doctrine referred to the Scotland case of *Brown v Magistrate of Edinburgh* (1931) SLT (Scots Law Times Reports) 456, where Lord Mackay explained 'that desuetude requires for its operation a very considerable period, not merely neglect, but of contrary usage of such character as practically to infer such completely established habit of the community as to set up a counter law or established quasi repeal'. After deliberating on this point the Supreme Court in *Johnson Tan* rejected the proposition that an Emergency Ordinance would lapse by effluxion of time or due to change of circumstances. The Supreme Court held that there cannot be an implied repeal of legislation.

[23] Malaysian legislation is perpetual in duration. It continues in force until either it is repealed or it expires. For a legislation to lose its applicability, it must be specifically repealed by the Parliament. It cannot be impliedly repealed simply by the flow of time or inactive use. Even if an Act or any part of an Act is intended to be of temporary duration, the provision for its expiry may be made by the adaptation of any of the techniques available in respect of the commencement of the statutes. Thus, an Act may specify a date when it will expire, it will be followed by an empowering provision to fix such a date would be made. An Act may provide for expiry upon occurrence of some stipulated event. There has been no recognition of the principle where a statute may lose its force merely through disobedience and lack of enforcement over a long period without express or implied repeal or expiry.

[24] This doctrine is also not applicable to English law or to Indian law. The position taken by the English courts is accentuated in the dictum of Lord Goddard in *Skyes v Director of Public Prosecutions* [1962] AC 528 (HL) at p 567 referring the guidance of Lord Sumner in *Bowman v Secular Society Ltd* at p 21. The English law does not recognize the principle by which a statute may in any circumstances be regarded as obsolete unless tacitly repealed or removed by the legislature, no matter how long it may have fallen into abandonment or how far its provisions may be in conflict with the altered circumstances of society.

[25] Since s 379 is not a determining section to this application we do not

find it necessary therefore to delve any further except to say that the doctrine of desuetude does not apply to s 379, and does not apply to the laws in Malaysia.

POTENTIAL WITNESS

[26] The next issue raised by the applicant is whether Dato' Sri Shafee would be a fit and proper person to be appointed under s 376(3) to prosecute the appeal bearing in mind that he may be a potential witness in the sodomy trial. This argument was premised on the fact that he was offered as a witness to the defence and his statement under s 112 of the CPC was taken. It was deposed in the affidavit of the applicant that Dato' Sri Shafee would be involved in the narrative of the prosecution's case and would be a material witness. The appointment therefore would pose a case of a conflict of interest and in breach of r 5(a) of the Legal Profession Act (Practice and Etiquette) Rules 1978.

[27] Mr Karpal Singh cited to us a few cases in support of his contention on the issue of conflict of interest. He relied on *Perbadanan Pembangunan Pulau Pinang v Tropiland Sdn Bhd* [2009] MLJU 120; [2010] 2 CLJ 1061. The facts in that case involved an application by the plaintiff to disqualify Dato' RK Nathan as a counsel for the defendant on the ground that he was substantially involved in the same case while serving as a High Court judge in Penang. He was alleged to have presided over the matter as a judge between 8 August 2001–25 August 2004 for no less than 13 times. After his retirement he went back to practice and became the lead counsel for the defence in that case. It was held that a strict approach to r 5(a) of the Legal Profession Act (Practice and Etiquette) Rules 1978 would be necessary to maintain the best interest of the administration of justice. Accordingly the court must be concerned, not of whether there was a conflict but the perception of the general public of appearance of impropriety and that would suffice.

[28] In *Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors (Uma Devi d/o R Balakrishnan, Third Party)* [2003] 6 MLJ 703; [2003] 4 CLJ 587 an advocate and solicitor was disqualified from representing the third party in the suit when he represented the same plaintiff in another related suit, Having found that the third party and the plaintiff were in opposite position and were therefore in conflicting position, the court in *Kayla Beverly Hills* addressed the inability of the counsel in that case to show how he could avoid disclosure of information by parties and how such conflict could be resolved.

[29] The other case cited by the applicant was *RS Muthiah v Pembinaan Fiba Sdn Bhd* [2004] 4 MLJ 78; [2004] 2 CLJ 917 where an application to disqualify a counsel from defending the defendant company was allowed. The main grounds of disqualification were because her husband was the managing director and the main witness of the defendant while she represented the

plaintiff in another case and that she was also the company secretary of the defendant company. The court held firstly that she would be in breach of r 3(b)(ii) of the Legal Profession (Practice and Etiquette) Rules 1978 namely, it would caused embarrassment where there is some personal relationship between her and a party or a witness in the proceedings. Secondly, she would be in conflict of interest position in view of the fact that she had acted for the plaintiff in the past and thirdly she could be in breach of r 27(a) of the same Rules where she would have pecuniary interest as a company secretary.

[30] We have no hesitation in accepting the principles stated in above cases. Having perused through the cases we find that whether a case of conflict of interest in a given case is made out would depends on the facts and circumstances of each case. What we note in each of the cases above the involvement by the counsel were seen obvious and we have no doubt that they would have compromised the administration of justice.

[31] Returning to the facts of the present application, we are mindful that the appeal to be prosecuted in the present case would purely be deliberated on the appeal records before the court. No witness would any longer be required. We further note that after a full trial at the High Court, Dato' Sri Shafee was neither called by the prosecution nor defence. It would not be wrong then to infer from that fact alone that he was therefore not a material witness to unfold the narratives of the prosecution's case. The fact that he was offered as a defence witness was because his statements were recorded under s 112 of the CPC. Even if his statements was taken under s 112 of the CPC it does not ipso facto make him a material witness. The prosecution is duty bound to offer persons whose statements were recorded under s 112 simply to avoid adverse inference under s 114(g) of the Evidence Act 1950.

[32] Having perused his statements under s 112, we find that they were recorded in relation to his presence at the house at the time when Mohd Saiful Bukhari met the Prime Minister, Dato' Sri Najib. We do not see how he would be relevant to a sodomy charge against the applicant. The facts of which in our view is too fleeting to bear any relevance to a sodomy charge. Our view is further fortified by the fact that both the prosecution as well as the defence did not find him to be a relevant witness in the trial.

[33] In the course of his oral submission learned counsel for the applicant suggested that the testimony of Dato' Sri Shafee would be relevant to the defence of conspiracy anchored by the applicant in his defence. If he had been a material witness to the defence, it is somewhat odd that the trial had gone passed, without his evidence been adduced.

[34] The fact that the trial is now over and neither the prosecution nor the

defence had adduced his evidence, would dispel any thought of him being a material witness. It had become amply clear that Dato' Sri Shafee is not a material witness to both the prosecution as well as the defence case.

[35] We agree with the submission of learned DPP that the position of Dato' Sri Shafee to prosecute this appeal is no difference from the role of Mr Karpal Singh as a defence counsel in *Public Prosecutor v Dato Seri Anwar Ibrahim & Anor* [2001] 3 MLJ 193. In relation to that case, Mr Karpal Singh disclosed in Dewan Rakyat on 22 October 1997 that the complainant and one of the witnesses in that case had met him regarding the applicant over the case. His statement was also recorded by the police. That would have made him a potential witness. He however represented the applicant as counsel throughout that trial. By comparison in our view, Mr Karpal Singh's role then is not too dissimilar than the facts referred to in respect of this issue. We say this because despite him being a potential witness Mr Karpal Singh acted as the counsel for the applicant during the trial. Whereas in the pending appeal the proceeding would proceed without witness.

[36] In the final analysis we do not find any merit in the grounds put forth in this application, and it was for all the above reasons that we dismissed the application in encl 27a.

Application dismissed.

Reported by Ashok Kumar